83 - 1482

No.

In The

Supreme Court of the United States

October Term, 1983

In the Matter of the Application of

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

CHARLES A. WEIL
Petitioner Pro Se
485 Park Avenue
New York, New York 10022
(212) 752-1982

QUESTIONS PRESENTED FOR REVIEW

1. Is the regulation herein unconstitutionally:

(a) Vague and indefinite contrary to the Fifth and Fourteenth Amendments;

(b) Overbroad contary to the Fifth and Fourteenth Amendments;

(c) Violative of the First, Sixth, Ninth, and Tenth Amendments?

2. Is it constitutionally permissible for state courts to evade constitutional issues?

3. Is there any non-federal ground herein resting on a fair and substantial ground for such evasion?

4. Is it constitutionally permissible for courts to speculate on possible other forms of relief when constitutional validity is in issue?

5. Are the constitutional issues of wide public interest herein likely to recur?

6. Were the state courts misled by a mare's nest?

7. Can anyone accused in a simplified information of anything "penal in nature" be constitutionally denied discovery, whether criminal or, under state law, civil, by bill of particulars?

PARTIES

The petitioner is Charles A Weil, residing at 485 Park Avenue, New York, New York 10022, 86 years of age, in reason whereof preference is requested with stay of proceedings.

Respondents are Hon. Joseph T. McClough, Environmental Commissioner of the City of New York, and Hon. Ermyn Stroud, Administrative Law Judge of the Environmental Control Board to whom has been assigned the hearing of the alleged violation.

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OPINIONS BELOW

The opinion of the New York Supreme Court, Special Term, New York County denying petitioner's motion was filed on December 30, 1982. The opinion of the New York Supreme Court, Appellate Division-First Department, dated June 30, 1983 affirmed the order of the Supreme Court, New York County.

The appeal to the New York State Court of Appeals was dismissed on November 3, 1983, reargument denied December 20, 1983.

JURISDICTION

The decision of the New York State Court of Appeals denying appeal without opinion, the affirmance of the Appellate Division, also without opinion, affirming the decision of Special Term, all evading all constitutional questions raised by petitioner denying reargument December 20, 1983, received December 26, 1983. This Court has jurisdiction to review the judgment herein by reason of the provisions set forth in 28 U.S.C. §§1257(2), (3), 2101, 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional:

> No person shall be deprived of life, liberty, or property without due process of law nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person . . . the equal protection of the laws . . . shall make no law . . . abridging the freedom of speech . . . or the right . . . for a redress of grievances.
>
> In all criminal prosecution shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . The enumeration of right . . . shall not be construed to deny others retained by the people . . . The powers not delegated . . . are reserved . . . to the people.

B. Statutory:

New York City Traffic Regulations (NYCTR):

> 71. No driver shall enter an intersection unless there is sufficient unobstructed space beyond the

intersection to accommodate the vehicle he is operating. . . (spillback or gridlock).

83. No person shall stand or park upon any street . . . as to obstruct the movement of traffic and in no instance so as to leave less than ten feet available for the free movement of vehicular traffic.

New York State Vehicle and Traffic Law (VTL):

1. Every motor vehicle . . . shall be provided with . . . suitable and adequate horn . . . for signalling . . . and shall not be unnecessarily loud or harsh.

386. No motor vehicle which makes excessive or unusual noise shall operate
2. which produces a sound level of eight decibels or more shall be deemed to make excessive or unusual noise
3. . . . the ear phone shall be placed at a distance of fifty feet.

New York State Criminal Procedure Law (CPL):

§100.25
1. A simplified information must be substantially in the form prescribed by the commissioner of motor vehicles . . . or the commissioner of environmental conservation . . . .
2. A defendant arraigned upon a simplied information is . . . entitled as a matter of right to . . . a supporting deposition . . . containing allegations of fact

New York State Civil Practice Laws and Regulation (CPLR):

103.(c) Improper form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it was not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

104. The civil practice law and rules shall be liberally construed to secure . . . th inexpensive determination of every civil judicial proceeding.

2001. At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be correct.

3001. The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such judgment, it shall state its grounds.

3041. Any party may require any other party to give a bill of particulars . . . .

3042. A request for a bill of particulars . . . shall be made . . . .

4511. Every court shall take judicial notice without request of . . . regulations.

5601(b). An appeal may be taken to the Court of Appeals as of right:

1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the state or of the United States.

STATEMENT OF FACTS

Petitioner, a motorist "beeped" his horn, for a split second, almost inaudibly, in a non residential, unprotected area after failing to attract the attention of the arresting officer to violations of traffic law, by an arm signal, on a crosstown bridge street.

When the officer ignored, or failed to respond to petitioner's hand signal, though only fifteen feet away, in plain sight, the officer made out a simplified information, charging violation of a little known, *sui generis* and unconstitutional, misplaced traffic regulation likely to recur, ensnare and affect millions of drivers in and through New York City annually.

Appeal as of right, to the New York Court of Appeals, on constitutional grounds per CPLR 5601(b) dismissed; reargument denied on December 20, received January 26, from affirmance without opinion of Appellate Division, of ruling by Special Term denying Article 78 proceeding. Why respondents and their agents should not be enjoined from proceeding further in a matter in the Environmental Control Board of the City of New York entitled *Board v. Weil,* Docket No. E-016-813-042 for declaratory judgment.

The proceeding is based on that respondents are alleged to be about to proceed without, or in excess of, their jurisdiction because of the unconstitutionality of the circumambulatory regulation, under which the alleged violation was brought, for the most conceivably trivial noise or traffic infraction, it's unreasonableness and overbreadth, unconstitutional for vagueness,

indefiniteness, penal in nature, also violative of the First Amendment, to prevent communication with a police officer of a grievance or violations of law. The point is not only constitutional, but also indisputedly novel.

A. The Regulation

> Section 1403.3 — 4.05 Sound Signal Devices
> No Person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise, except that:
>
> 1. No person shall operate or use or cause or cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger.

B. It Affects Millions of People Entrapping Not Only the Million of City Drivers.

It is deceptively misplaced, neither in state Vehicle and Traffic law nor New York City traffic regulations. No one would dream of looking up environmental regulations before driving in the city. It lurks, snares, and entraps.

Before the violation was served on petitioner, he signalled police with his arm, in plain sight, fifteen feet away to call said officer's attention to several violations of traffic law causing petitioner to make a light, split-second, almost inaudible beep of his horn to call said officer's attention, in a non-residential, unprotected area.

On June 8, petitioner requested a verified bill of particulars and/or supporting affidavit per letter on June 8, copy of which is annexed as Exhibit B, thereto annexed pursuant to CPL 100.25 and 100.40, which was denied.

Respondent's affirmation misleadingly asserts the proceeding was brought only because of failure of disclosure. That is a glaring misstatement. It was principally because of the constitutional aspect of the matter, attested by letter to respondent, dated June 24, Exhibit A and paragraph 8 of the petition.

> Petitioner verily believes said regulation is in violation of the due process clause of the constitution; being vague, indefinite, and unreasonably overbroad; prohibiting the right to communicate prima facie evidence of violation of law and nuisance to hundreds of people, to a police officer in plain sight, to attract his attention thereto.

On the Fourth of August, 1982, petitioner wrote respondents, inquiring whether there is any reported case construing or ruling on the constitutionality of the regulation to which petitioner significantly never received reply, wherefore petitioner verily believes there has been no such case, and that the petitioner herein raises a point of law that is both novel and constitutional, and indisputedly likely to recur (Par. 21, 26).

Unconstitutionality of the regulation was repeatedly raised in reply affidavit, yet Special Term abusedly evaded that issue in its opinion.

In reply affidavit (par. 17) petitioner clarified the form of relief, sought "declaring" (declaratory misspelled by typist) "judgment", a mistake that can be corrected at any stage of the proceeding, CPLR 2001 (p. 23). For this is a matter criminal in nature (*People v. Byron, supra*, 17 N.Y. 2d 62 at 65) and

> Judicial inquiry is not of course--foreclosed as in the constitutionality of any individual enactment or regulation.

> *Matter of Rosenthal v. Harnet*, 36 N.Y. 2d 269, 274

where a fine is proved by any New York law, *supra*,, and where

> a defendant's driving privilege—may be utterly dependent and which is a privilege protected by due process (*see Bell v. Bursin*, 402 U.S. 553 at 539).
> *Matter of Rosenthal, supra* at 277.

Calling it a civil proceeding does not make it so, with all the earmarks of being "penal in nature" on the face of the simplified information: Penalty; Plea; Violation; Loss of License; Providing for Recidivism, only known in criminal law.

C. All State Courts Were Utterly Misled by Respondents' Mare's Nest: A *Writ* of Prohibition, Never Sought.

Special Term's language in its opinion indisputably evidences it

> "Order prohibiting"
> "This extraordinary remedy is used only", etc.

Of the 113 words of the opinion, 80 are clearly addressed only to the writ, clearly contradicted by paragraph 11 of the reply affidavit (R22):

> Nor does petitioner necessarily seek that bugaboo of procedure, a *writ* of prohibition (emphasis supplied)

but that the only question was

> whether or not the regulation herein is constitutionally valid, as above set forth (pars. 3 and 4) (R22)
>
> 3. it was principally because of the constitutional aspect (R20).

Then 22 words in the opinion are addressed to an aspect (disclosure) specifically rebutted in the reply affidavit (par. 3), *supra*

> that is wholly misapprehended, *supra,* principally, *supra.*

Then the remaining 13 of the 113 words are addressed to the constitutionally impermissible speculation of possibly other remedy or mootness.

There was not a syllable addressed to the overriding constitutional questions, per paragraph 8 of the petition

> said regulation is in violation of the due process clause(s) of the constitution; being vague, indefinite, and unreasonable; prohibiting the innoxious with the noxious; the right to communicate prima facie evidence of violation (of) law–to a police officer in plain sight to attract his attention thereto (R10).

Such constitutional issues were further dealt with in paragraphs 3, 6, 7, 8, 13, 15, 16, 17, and 18 of the reply affidavit, Exhibit B of the reply affidavit, and paragraphs (a), (c) and last paragraph of the petition's amendment (R14).

The constitutional questions were covered in 14 of the 22 pages of petitioner's brief in the Appellate Division and 10 pages of the 14 in the reply brief thereto.

In the Appellate Division brief, two pages were addressed to the writ hoax and two to the constitutionally erroneous speculation or possibly other remedy and mootness.

That is entirely apart from complete violation of CPLR 103 and 104 that pleadings be liberally construed, and no cause of action be dismissed solely because of form of relief, *infra*.

D. Such Canard Not Only Warrants Reversal Per Se, But Admonishment by this Court (58 C.J.S. §823-4).

For even if such writ had been sought (*infra*, Point VIII) where a constitutional question is raised, same could well lie; and/or be converted into a declaratory judgment actually sought

> While it might not be unusual for lower courts to dismiss every case they do not want to hear on procedural grounds "Why Courts Don't Work", Judge Neeley, p. 25.

for whatever reason, it is unusual for an appellate court to do so *a fortiori* on spurious procedural grounds, to which canard that court's attention had been called in reply affidavit, both briefs, on oral argument, and brief on motion for reargument in the Court of Appeals.

E. Relative Discovery

Petitioner sought discovery, June 8, 1982, by bill of particulars (R13) per Criminal Procedure Law, §§100.25 and 100.40 under which the State Environmental Commissioner is required to supply

when the accusatory instrument is a simplified information as herein, per authorities, state and federal as per Exhibit A (R25).

But respondent replied, denying same on ground the matter was civil, so petitioner requested such bill of particulars under Article 30-31 of CPLR (Section 3041-2). Per paragraph 12 in reply affidavit (R22). Respondents' affirmation refused on grounds its (ex parte) Rule 2.7 did not provide for same.

REASONS FOR GRANTING THE WRIT

I.

THE REGULATION VIOLATES THE DUE PROCESS CLAUSES OF THE CONSTITUTION IS VAGUE, INDEFINITE, OVERBROAD AND UNREASONABLE AND THE FIRST AMENDMENT PROHIBITING THE RIGHT TO COMMUNICATE TO A POLICE OFFICER IN PLAIN SIGHT TO ATTRACT HIS ATTENTION ALSO THE SIXTH, NINTH AND FOURTEENTH AMENDMENTS.

The circumambulatory regulation forbids sounding an automobile horn except in case of "imminent danger", whatever that means.

The violation is of a noise regulation on which there is no reported case.

A. Vagueness and Indefiniteness

Vagueness and indefiniteness are glaring on the simplified information itself. The arresting officer himself was uncertain what the regulation covered; thought it required an "emergency" that neither V&T 375, nor the regulation require in *haec verbis*.

There was a complete breakdown of traffic law, alleged in the petition.*

Only the vagueness in his own mind explains his insertion of the words "no emerg" on the simplified information.

But if the regulation takes no account of such violations of law and nuisance to hundreds, if not thousands, of people, it is indeed overbroad and unreasonable.

---

* *Hors the record:*

1. Traffic on Park Avenue completely blocked by spillbacks or gridlock violating NYCTR 81(3) that blocked north and south traffic to emergency vehicles; fire, ambulance, police.

2. East bound on 59th Street by double parking [NYCTR 81c(2)] to the curbs north and south.

3. Leaving less than 10 feet for the free passage of traffic (NYCTR 85).

4. Blocking the right hand turn on 59th Street into Lexington Avenue for three green lights.

It is deceptively misplaced, neither in state Vehicle and Traffic law nor New York City traffic regulations. No one would suppose such regulation was ambushed in an environmental regulation for such trap to ensnare millions of drivers.

It is a contrivance too clever by half, neither wholly civil, as it alleges; nor penal, evading disclosure requirements in both civil and criminal law, subjecting its prey to run a vexatious procedural gauntlet of "pre hearing conference" at which the arresting officer bolsters his quota without appearing then

2. hearing
3. interlocutory appeal
4. appeal, and then finally
5. resort to court, as herein to have its constitutionality determined.

Of course quarries "pay the two dollars" if the aphorism be permitted.

Muffler sound regulation is under V&T 386, automobile horn sound regulation. This lurks under a recondite section of the environmental protection agency regulations no ultra cautious driver would suspect secretes anything affecting his driving a car in New York City outside of state V&T or New York City Traffic regulations.

Then to add to the police "quota" snare, environmental excess of zeal has added the vague, unreasonable, and overbroad word "imminent" to the already "vague" word of "danger" in the city traffic regulation, *infra*.

Most such cases are under V&T which bring out some rinciples of law litigated, of guidance to courts, police or drivers. The problem is hence novel.

Danger is a matter of subjective perception and opinion, as are its various gradations of imminence. One person will consider violations of law constitute danger, others may not.

B. The Word "Danger"

In no court below, nor did respondent, furnish any definition of the word in any ruling of any court, particularly in a law or regulation penal in nature

> . . . a meaning long recognized in law and life.
> *People v. Stefanik*, 103 M.2d 539.

What constitutes danger? Danger of what, collision, violation of law? To whom, the blower, blowee, the public? Danger to what, life, limb, liberty, property? Who is to determine?

Let court or motorist answer such questions without recourse to extrinsic aid.

Resort to dictionary only increases the vagueness. In Century Dictionary:

> "absolute power"
> Peril, risk, hazard, exposure to injury, loss, pain, of other evil, injury, harm, damage.

Webster New International Unabridged, 2nd Ed.:

> Danger, harm, difficulty, power jurisdiction, authority, jurisdiction, power of control, hence reah or range as of a missile. Of state of being in subjection of control, duress, state of being liable as to a penalty. Exposure or liability to injury, loss, pain or other evil.

Corpus Juris, Sec. 2, Vol. 25, p. 998:

> Danger, a general or generic term which implies or includes connections, refers to exposure or liability to injury, loss, pain, *or other evil*, risk, insecurity. The term is a relative one and in one of its frequent applications includes such contingent harm or injury as reasonable prudence ought to foresee and provide against as probably in prospect, and has been held to be equivalent of jeopardy and peril.

In the bewildering hodge podge of minute traffic regulation, this is not giving the autoist what he is entitled to

> The clear unequivocal warning before conduct on his part which is not *malum in se* can be made the occasion of a deprivation of his liberty or property.

People v. Phyfe, 136 N.Y. 554; *People v. Shakun*, 251 N.Y. 107 at 113-4.

C. The Word "Imminent"

Nor does the word "imminent" detract from the lack of objectivity and indefiniteness of the word "danger" in a statute or regulation penal in nature, rather it adds to them.

Century Dictionary-Imminence:

> 1. The quality or condition of being imminent;
>
> 2. That which is imminent; impending evil or danger.

Imminent:

> 1. Project, overhanging, fixed pendently or so as to overlook, projecting from above;
>
> 2. Threatening or about to fall or to occur, impending, threatening, hanging over one's head imminently in an imminent manner.

Webster, *supra:*

> Threatening to occur immediately, near at hand, impending, said especially of misfortune, peril.
>
> For the violations of traffic regulations *had occurred and were still occurring.*

It is submitted resort to such tautology fails to define or render less subjective and indefinite:

$$0 \pm 0 = 0$$

neither does recourse to other dictionaries help make more definite and objective the indefinite word "danger" itself.

It is a matter of common knowledge, of everyday occurrence, of which courts will take judicial notice:

1. The visceral split second "beep" when the driver in front is blocking traffic "goes to sleep" when the light turns green;

2. A driver parks, leaving less than 10 feet for traffic flow (NYCTR 83);

3. Blocks an intersection by spillback;

4. When someone exits on the traffic side (as distinguished from the curb side), especially when on the other side the traffic lanes) there are less than 10 feet for movement of traffic;

5. There are many three lanes, one way arteries, like Franklin Roosevelt Drive, Grand Central Parkway within city limits on which there are accidents or stalled cars in the middle land, with occupants exiting and milling around. Is their danger imminent to or from vehicles in the other two lanes about to overpass?

6. When traffic lights don't work;

So with muffler noise regulation (V&T 386).

Loud speakers are regulated by language which courts have held sufficient to declare invalid statutes and regulations, particularly the latter, for excessive restraint without trangressing First Amendment rights.

On appeal, the County Court reversed, holding that verbiage of the statute was too vague and indefinite to give clear positive and unequivocal warning of the rule to be obeyed.

The prosecution in this case was for a "traffic infraction", not a crime, but such a prosecution is penal in nature and the rules of criminal law are generally applicable. (People v. Lewis, 18 NY 2d 180). As the County Judge stated, a criminal statute must be sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which is to be obeyed.
People v. Byron, 17 N.Y. 2d 62 at 66.

"Conduct for which a sentence to a term of imprisonment or to a fine is provided by any law" (emphasis added). Fines for speeding, the offense involved in this case, can be as high as $500. A defendant's driving privileges, on which one's mobility in today's society may be utterly dependant, and which is a privilege protected by due process (see Bell v. Burson, 402 U.S. 535, 539), may be forfeit.
Matter of Rosenthal v. Hartnett, 36 N.Y. 2d 260 at 278.

The vagueness doctrine is commonly applied to criminal statutes (Jordan v. De George, 341 U.S. 223, 230-231, reh. den. 41 US 956; Connally v. General Constr. Co., 269 US 385, 391; People v. Byron, 17 NY 2d 641, 67) and to administrative regulations which carry penal sanctions (United States v. Mersky, 361 US 431; Kraus & Bros. v. United States, 327 US 514, 621). There is, however,

> a growing recognition that it is also applicable to statutes or administrative regulations imposing serious civil sanctions, especially where First Amendment rights are implicated.
> *Quintard Ass'n. v. N.Y. State Liquor Auth.*, 57 A.D. 2d at 464.

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic police matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operated to inhibit the exercise of (those) freedoms."
> *Grayned v. City of Rockford*, 408 US 108 at 109.

Noise can be regulated by regulating decibels. *Saia v. New York*, 334 U.S. 558 at 562.

D. Overbreadth

The horn banning is not only vague and overbroad, but complicated and made confusing by the circumductive exception that is also vague and excessively narrow with the hodge podge of all the vices for which courts have struck down statutes and a *fortiori* overzealous, overreaching administrative regulations that have proliferated, as in *Saia v. New York*, 334 U.S. 558 at 562.

> There are standards prescribed for the exercise of his discretion. The statute is not narrowly drawn

> to regulate the times or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in Cantwell v. Connecticut, 310 U.S. 296; Lovell v. Griffin, 303 U.S. 444; and Hague v. C. 16, 307 U.S. 496, 559-60. The present ordinance would be a dangerous one if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. Any abuses can be controlled by narrowly drawn statutes. *Saia* at 559-60.

Respondent board idem with horns itself recognizes the need for objective, rather than the subjective standard or scale noise of a quota conscious police officer, by provision for use of decibels, as in #140.3-1.05(2); sound level meters (idem rr) sound pressures level (decibels (ss) and in connection with motor vehicles #1403.3-5.03, setting sound levels by sound level meters, *infra*.

It can also achieve a reasonable objectivity by specifying volumes and distances.

> It is true that the ordinance in specifying volumes and distances which delimit permissible noise levels not only speaks to the specific area of regulation with which Kovacs treats, but also, in supplying more precise standards, does not suffer from the vagueness which made the Kovacs ordinance less than ideal. (see Grayned v. City of Rockford, 408 US 104, 108-114 *supra*.) For similar reasons, those parts of the ordinance which list the times and places where sound equipment may not be used and spell out criteria, such as congested traffic conditions, street repairs, or overcrowding caused

> by overlap of permits, to guide the police in determining whether considerations of public safety are extensive enough to permit limitations on the granting of a permit in the first instance, cannot be attacked for insufficient specificity (Contrast Cantwell v. Connecticut, 310 US 296, *supra* (Freedom of religion); Lovell v. Gridin, 303 US 444 *supra* (freedom of the press); Hague v. CIO, 307 US 496, *supra* (freedom of speech)). e.g. near Schools or Churches.
> *People v. Taub*, 37 NY 2d 530 at 533.

Such a reasonable objective is as in Byron, *infra*. The evil sought to be prevented is "excessive or unusual noise."

> The purpose of the statute is not to prohibit noise, but to minimize noise. Byron, 17 N.Y. 2d 62 at 67-8.

> Since Saia there was a conscious attempt of the legislature to supply the missing objective standard of the precise quantity of noise prohibited. People v. Byron at 67.

> Any abuses which loud speakers (or horns) can be controlled by narrowly drawn statutes.
> *Saia* at 562.

Nor is this regulation solely one of vagueness that

> Men of intelligence must necessarily guess at its meaning.
> *Connally v. General Construction Co.*, 269 US 385 at 391, 343.

but also

> "differ at its application"

violating the first essential of due process of law and make the decision to blow or not to blow in a split second *a fortiori* where there is an "overbroad" definition in a penal law or regulation. *Grayned v. City of Rockford,* 408 U.S. 104 at 114; *Board of Education v. City of Buffalo,* 57 M.2d 472.

It must be in

> just relation to the protection of the public.
> *Adams v. Tanner,* 244 U.S. 590 at 596.

or give

> a rough idea of fairness.
> *Colten v. Kentucky,* 407 U.S. 104 at 110; *Matter of Sloan,* 81 A.D. 2d 1014.

An additional vice of this subdivision is its peculiar susceptibility to arbitrary enforcement.

> A narrowly drawn ordinance regulating hours, places of use, volume of sound would achieve in the court's view, the proper balance between public need for convenience, and the necessary safeguarding of constitutional rights. People v. Katz, 21 NY 2d 132, 134.
>
> While local government can draw a narrow regulation limiting audibility of sound, Saia v. New York, *supra,* Subdivision (2) of Section 1703, in addition to drawing such limits, also limits the

sound so "that said volume is not unreasonable, loud, raucous, jarring, disturbing or a nuisance to persons within the area of audibility." This language is constitutionally defective on two counts.

The language "disturbing or a nuisance to persons within area of audibility" is likewise unconstitutional since it subjects the right of free speech to an unascertainable standard. See Coates v. Cincinatti, 402 U.S. 611; Saia v. New York, *supra.*

Again, while the government may draw a narrow regulation regarding sound equipment, such regulation must bear some reasonable relation to a valid interest and cannot be arbitrary. *People v. Dominick,* 68 M.2d 425.

For the exception "imminent danger" makes the banning overbroad criticized by Judge Manfield in *Jewish Concerned Youth v. McGuire,* 421 F.2d 471 at 478.

"blanket bans and absolute prohibition".

The Supreme Court has recently been invalidating State statutes very similar to the legislation before us on the ground that they "suffer from impermissible 'overbreadth' " and had a "stifling effect" on "freedom of association". (Keyishian v. Board of Regents, 385 U.S. 589, 607, 609; see Hibrandt v. Russell, 384 U.S. 11; Dombrowski v. Pfister, 380 U.S. 479P. Matter of Bell v. Waterfront Commission, 20 NY 2d 54 at 61.

> Overbreadth exists when there is regulation of A and B, when regulation of B is forbidden and vagueness exists when there is otherwise valid regulation of A but in terms so uncertain that it is impossible to tell whether the situation comes under A or B even though B might otherwise be subject to constitutional regulation, citing Words & Phrases, 30 A, p. 330.

E. It violates the First Amendment.

As to communication, if a police officer ignores a hand signal, there is no other way a driver can communicate with such officer without getting of his car and violating some other regulation such as NYCTR 80(a) and (b) 83, 155.

The regulation could have prohibited emitting long, loud, raucous, repetitious noise, not prevent communication, violative of the First Amendment, to a policeman in plain sight, who ignores a visual signal, or a "grievance" (per First Amendment) or of *prima facie* evidence of violations of law or annoyance to hundreds of passengers in many cars stalled by violations of traffic law.

A beep is the only way a motorist can communicate with a police officer, in plain sight for help, information, grievance, violation of law, a nuisance, or emergency, *a fortiori* if a visual signal, that cannot be disputed, fails to attract the officer. Such banning the inoxious with the noxious violates the First, Sixth, Ninth and Tenth Amendments to the Constitution.

> But in that process one should be mindful to keep the freedoms of the First Amendment in a preferred position.
> *See Marsh v. Alabama*, 326 U.S. 501, 509; *Saia* at 562.

The "previous restraint" herein is on "redress of grievance", "dressed in the garb of the control of "noise". *Saia* at 559-60.

> We hold that #3 of this ordinance is unconstitutional for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment.
>
> There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the times or places of use of loud speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the others which were struck down.
> *Cantwell v. Connecticut,* 310 U.S. 296; *Lovell v. Griffin,* 303 U.S. 296; *Hague v. C.I.O.,* 307 U.S. 496.
>
> This regulation sanctions a device for suppression of free communication of a grievance". *Saia* at 562.
>
> Despite their disparate approaches, the decisions made clear that the power of the State to infringe on the freedoms embodied in the First Amendment is a limited one, defined not by mere rationality or purpose but by a more stringent requirement of real necessity.
> *Edwards v. South Carolina,* 372 US 229; *People v. Taub,* 37 NY 2d at 533.

We repeat

> where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. *Grayned, supra,* 408 U.S. 108 at 104.

The right to communicate inherently comprehends the right to communicate effectively.

> Courts then have the task of balancing the legitimate community interests protected by such statutes against the infringement of First Amendment rights, but in that process, they should be mindful to keep the freedoms of the First Amendment in a preferred position. Reeves v. McConn, 631 F.2d 377 at 382.

> The court must "weigh heavily the fact that communication is involved" and require that the regulation "be narrowly tailored to further the State's legitimate interest." I. at 115-17, 92 S. Ct. at 2303-04. "Because First Amendment freedoms need breathing space to survive, Government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415.

The regulation under attack leaves no

> ample alternative channels for communication

this Court required *Consolidated Edison v. PSC,* 47 N.Y. 2d 94 at 106, *reversed on other grounds,* but approving the requirement of such ample alternative channel. 447 U.S. 530 at 536.

> The statute must "represent a considered legislative judgment that a particular mode of expression has

to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611-12, 93.

F. More Overbreadth

If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement.

> MANSFIELD, Circuit Judge. We have long recognized the inadvisability of entrusting to the protectors of public order the unchecked authority, to restrain First Amendment activity, for there is a tension, requiring careful and sensitive balancing, between freedom and order. The restrictions go far beyond measures that are justifiable as reasonably necessary to public needs.
>
> Even when regulations are fully authorized by explicit and narrow legislative authority, they must be "narrowly tailored to further the State's legitimate interest." Grayned v. City of Rockford, *supra,* 408 U.S. at 116-17; Police Dept. v. Mosely, *supra;* Cox v. New Hampshire, 312 U.S. 569, 575-76, 61. The state bears the burden of justifying restrictions, e.g., Cohen v. California, 403 U.S. 15, 20, 91.

II.

THE REGULATION DEMURRED TO DENIES EQUAL PROTECTION OF THE LAWS, DENYING ONLY TO MOTORISTS OBJECTIVE STANDARDS LIMITS, OR SPECIFICITY REQUIRED IN ALL OTHER *BONA FIDE NOISE* REGULATIONS OF RESPONDENT'S ADMINISTRATIVE AGENCY.

(Raised in Appellate Division reply brief pp. 4-5; Ex. B, 5th par. R26, Ex. C, 4th par. R27).

A horn is not *malum in se,* nor is use of same, for, under V&T 375 it is equipment required of every motor vehicle in New York State, to be used for "signalling".

In all five other targets of *bona fide* noise regulations of respondents there are prescribed standards, limits, and specificity of which the Court will take judicial notice (CPLR 4511) as enumerated below:

a. On distances at which noise shall be audible; at least 50 feet on motor vehicles per their 1403.5-5, 17 (making the regulation under fire surplusage, except for police quota purposes and to fund respondents' agency, contrary to *Tumey v. Ohio,* 273 U.S. 510.

b. It also only forbids operation of a klaxon when it creates a sound level, beyond the parameter 88-10dB (A) per, *Saia, supra,* beyond those 50 feet (not fifteen, as herein), creating a discrimination impermissible in a regulation penal in nature, or;

c. Must annoy, disturb, injure, or endanger the comfort, repose, health, peace or safety of a person, or which causes injury to plant or animal life or damage to property or business per their 1403.3; 1.03-1.03; or 1403.3-1-i.05 (zz), or;

d. Lasts more than 10 seconds for any one emission, per their 1403.3-4.05; or

e. Otherwise exceeds sound levels expressed in terms of decibels per their 1403.3-5. 11, 13, 15, 21 (b). It is only against motorists that no standards specificity or limit is required in violation of the constitution.

The challenged regulation ignores also the non-enumerated rights secured to the individual under the Ninth and Tenth Amendments, if it denies the privilege of signalling to inform government officers of violations of its laws, as herein. *In re Quarles v. Butler,* 158 U.S. 532; *Logan v. United States,* 144 U.S. 263, and subjecting them to:

a. Blanket bans;

b. Denials of specificity in laws penal in nature;

c. First Amendment rights to communicate grievance to police.

In sum, the words "equal protection of the laws" were to obviate discrimination by law so that with respect to a limited group of privileges the law would treat blacks (or motorists) no differently.

Government by Judiciary-Berger, p. 191.

III.

RESPONDENT'S RULES VIOLATE THE SIXTH AMENDMENT.

By denying bills of particulars, compelling resort to retaining expensive counsel (contrary to CPLR 104) for written interrogatories only, more than the $50 fine involved, violates the Sixth Amendment raised below

> Reply affidavit par. 6, R21; Par. 12, R22; and Ex. A, R25; briefed p. 11.

denying discovery to prepare for trial and against police perjury.

In an instance involving a New York simplified information it was held

> The Constitution requires that the defendant be informed of the nature of the charge and the circumstances under which he is alleged to have violated the law. But the bill of particulars which the defendant could have had on demand fulfills this function.
> *People v. Boback*, 23 N.Y. 2d 912 at 917.

This was admitted in respondent's affirmation Par. 9, p. 3 relative respondent's Rule 2.7.

A. More Overbreadth

Violation of the First, Sixth, Ninth, Tenth, and equal protection of the laws further compound the overbreadth of the Fifth and Fourteenth Amendments due process clauses.

IV.

THE ISSUE IS ONE OF GENERAL ENDURING IMPORTANCE AND SPECIAL TERM ERRED IN SPECULATING ON POSSIBLE MOOTNESS ON AN ISSUE LIKELY TO RECUR IN NEW YORK CITY TRAFFIC ANARCHY.

East Meadow Ass'n. v. Board of Education, 18 N.Y. 2d 139 at 135; accord

> *Matter of Gold v. Lomenzo,* 29 N.Y. 2d 468 at 476: However, it is settled that judicial reluctance to decide questions which need not be reached must give way when a case raises 'important constitutional issues' and the 'controversy is of a character which is likely to recur'. (*East Meadow Community Concerts Ass'n. v. Board of Education,* 18 N.Y. 2d 129, 135; *see Dombrowski v. Pfister,* 380 U.S. 479, 486, 487; *Abington School District v. Schempp,* 374 U.S. 203,224, n. 9; *United States v. Raines,* 362 U.S. 17, 21-23). The present is—and this is also the view of the dissenting judge—such a case.
>
> *Matter of Bell v. Waterfront Comm.,* 20 N.Y. 2d 54 at 61:
> Question is one of major importance and because it will arise again and again, one that invites immediate decision. (*see e.g. Matter of Glenram Wine & Liquor Corp. v. O'Connell,* 296 N.Y. 335, 340; *Matter of Lyon Co. v. Morris,* 261 N.Y. 497, 499).

Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402 at 404:

> The question of mootness, as here presented, is itself a question of constitutional law. (*Cf. Linery, Jafco, Inc.*, 375 U.S. 301, 304 et seq; *Davis v. Wechsler*, 263 U.S. 22, 24). We therefore have jurisdiction to consider the propriety of the Appellate Division's failure to reach the merits of the dispute on the ground of mootness.
> *East Meadows Ass'n. v. Board of Education*, 13 N.Y. 2d 129, 130.

The court will take judicial notice of widespread horn-blowing that is necessary and much that is not.

> There is ample authority that a matter—will not be considered academic when the underlying questions are of general interest and substantial public importance and likely to arise with frequency.
> *Matter of Gold v. Lemenzo*, 29 N.Y. 2d 468 at 475.

V.

SUCH SPECULATION WHERE INVALIDITY AS HEREIN BELOW ON CONSTITUTIONAL GROUNDS IS INVOKED HAS BEEN DENOUNCED RECENTLY BY THE SUPREME COURT OF THE UNITED STATES.

> *Ins. v. Chadha*, 103 S.C. 2764.
> It is contended that the Court should decline to decide the constitutional question presented by this case because Chadha may have other statutory relief available to him—

—at most those other avenues of relief are speculative.

A person threatened—cannot be denied the right to challenge the constitutional validity—merely on the speculation over the availability of other forms of relief.

VI.

SPECIAL TERM ERRED AB INITIO IN NOT ADDRESSING THE NOVEL CONSTITUTIONAL ISSUE.

We agree with the determination below and concur with the views expressed by Special Term, except to the extent that it failed to address itself to the constitutional issue presented. In our opinion, the constitutional issue is cognizable in the instant proceeding, and, consequently, Special Term should have addressed itself to that issue. *Kovarsky v. Housing & Development*, 31 N.Y. 2d 184 at 191.

accord

Vintage Soc. Wholesalers Corp. v. State Liquor Authority, 63 M.2 287; *East Meadow v. Board of Education*, 18 N.Y. 2d 129 at 130.

VII.

THE INSTANT IS A FLAGRANT CASE OF EVASION OF CONSTITUTIONAL ISSUES, CONTRARY TO *DEMOREST v. CITY BANK*, 321 U.S. 36 at 42.

Whether the New York courts evaded six constitutional questions for political reasons, as suggested by Judge Neely in his recent book "Why Courts Don't Work":

> While judges must always hear routine, criminal, tort, and domestic cases or suffer vociferous public outrage, they can be unimaginative in the political area and dismiss every case they do not want to hear on procedural grounds. While obstructionist tactics of the variety can always be the subject of appeal. . .

but appeal did not work herein, nor per

> Powers of the Court of Appeals Revised Ed. p. 274 citing *Demorest*,

neither in the Appellate Division nor Court of Appeals

> Whether the state court has denied to rights, asserted under local law, that protection which the Constitution guarantees, is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a 'fair or substantial basis.' If unsubstantial, constitutional obligations may not thus be evaded.

In both New York higher courts petitioner briefed that under New York State rulings all three courts evaded its rulings that required addressing constitutional questions

> *Lakeland v. Onandaga,* 24 N.Y. 2d 400 at 408

significantly without citing authority, also

> *Kovarsky v. Housing Development,* 31 N.Y. 2d 184 at 191; *East Meadow v. Board of Education,* 18 N.Y. 2d 129 at 130; *Matter of Roosevelt Raceway v. County of Nassau,* 18 N.Y. 2d 30 at 42; *Matter of Nicholson,* 50 N.Y. 2d 906; *LaRocca v. Lane,* 37 N.Y. 2d 574.

Special Term's opinion even flouted New York's procedural law and focused only on the bogus writ of prohibition.

Subsequent to the argument in the Appellate Division, but prior to its affirmance, this Court upheld petitioner's contention Special Term erred constitutionally, glaringly in its last thirteen words

> "The hearing could possibly exonerate him and render all other issues moot." *INS v. Chadha,* 103 U.S. 2764

which held

> A person threatened—cannot be denied the right to challenge the constitutional validity—merely on the speculation over the availability of other forms of relief.

dealt with in the brief on motion for reargument thereof, pp. 5-6, nevertheless denied (December 20, 1983).

Moreover, in Appellate Division briefs, petitioner had shown how Special Term had been misled by the prohibition hoax and on oral argument drew that court's attention (it was read verbatim)

> "ask this court not to be misled by the spurious, sham issue lugged in relative writs of prohibition."
>
> Special Term's error was induced by misstatement of respondent, whose affirmation dealt almost exclusively with writs of prohibition, never sought (4 pages) and whose brief devoted seven pages to writs of prohibition.

Likewise in petitioner's brief on motion for reargument

> Also overlooked was the misleading sharp practice, perhaps tantamount to fraud on the courts below, that a *writ* (emphasis in the original) of prohibition had been sought. The language in Special Term's opinion certainly evidenced it, 'This extraordinary remedy is used only' while the petition sought enjoined. . .

Said mare's nest on courts below was raised in petitioner's brief in the Appellate Division.

> In reply affidavit (par. 11) petitioner clarified the form of relief sought, 'declaring' (declaratory) (misspelled by typist) judgment, a mistake that can be corrected at any stage of the proceeding (CPLR 2001, p. 3 of brief).

VIII.

THE NEW YORK COURTS NOT ONLY EVADED THE CONSTITUTIONAL ISSUES BUT THEIR OWN RULES OF PROCEDURE SO THAT THE NON FEDERAL GROUNDS DO NOT REST UPON "A FAIR OR SUBSTANTIAL BASIS".

Cohen & Karger, supra, p. 274 citing *Broad River Power Co. v. South Carolina,* 28 1 U.S. 537; *Demorest (supra); Davis v. Wechsler,* 263 U.S. 22.

As in the instant matter per Kowarski (*supra*) the Court of Appeals held, as it should have done herein

> Since it is not questioned that the necessary parties are before the court, Special Term, pursuant to CPLR 103 (subd. c) should have treated the instant proceeding as an action for a declaratory judgment seeking to test the constitutionality of the aforementioned section of RSL, and proceeded accordingly (citing cases). Thus Special Term erred in failing to address itself to this issue at 192.
>
> In sum, the constitutional issue raised by the appellants is cognizable in the instant proceeding and the court below erred in refusing to address itself to it. Needless to say, this decision is in harmony with the evolution of the law in this area, (citing cases many of which are cited herein at 192).

Another ruling should suffice on this score

> there is no doubt that the Supreme Court had jurisdiction of this proceeding and that it is a civil judicial proceeding within the meaning of the

> statute (citing cases). This being so, the proceeding should not have been dismissed because 'it (was) not brought in the proper form CPLR 103 subd. (c) citing authorities'. A declaratory judgment action is unquestioningly a 'proper procedure' (citing cases). *Lakeland Water Dist. v. Onandaga Co.*, 24 N.Y. 2d 407 at 409.

> Jurisdiction will be taken on the federal question if it is determined that the state court's decision on the non federal grounds does not rest 'upon a fair or substantial basis.' That rule is designed to prevent evasion by the state court of any federal constitutional issue in the case.
> Cohen & Karger Powers of the New York State Court of Appeals, Rev. 1952, p. 274.

For below petitioner-appellant briefed the Appellate Division on New York's CPLR 103(C), 104.

> a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

and CPLR 3001 (raised in brief to Appellate Division).

The New York Supreme Court may render a declaratory judgment.

Where a petitioner alleges a statute is unconstitutional in a proceeding pursuant to CPLR, Article 78, the proper procedure is to convert the matter to a declaratory judgment action and meet the constitutional issues. *Harding v. Melton*, 67 A.D.2d 242 at 248; fully briefed in the Appellate Division. *Phelon v. Theatre*

Protects Union, 22 N.Y. 2d 34; *Mtr. of Micheil v. Kahn*, 62 A.D.2d 302 at 308; *Mtr. of Roosevelt Raceway v. Co. of Nassau*, 18 N.Y. 2d 30 at 42; *Mtr. of Nicholson*, 50 N.Y. 2d 906; *Kovarski v. Housing Development*, 31 N.Y. 2d 184 at 1917 *ad infinitum*.

An action for a declaratory judgment is an appropriate remedy for challenging the constitutionality of an amendment to an administrative by law (citing cases) and on a motion to dismiss, pursuant to CPLR 3211-2(e) all the allegations of the petition have to be assumed as true, or are incontrovertible. *Felice v. Swazey*, 278 A.D.9, 58.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Courts of New York State.

Respectfully submitted,

Charles A. Weil
Petitioner Pro Se

APPENDIX

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

ORDER OF APPELLATE DIVISION
FIRST DEPARTMENT

1 Mo. No. 1126 SSD 157

In the Matter of the Application of Charles A. Weil,

Appellant,

vs.

Joseph T. McClough and Ermyn Stroud,

Respondents,

For a Judgment &c.

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Nov. 3, 1983

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 30, 1983.

Present—Hon. Joseph P. Sullivan, Justice Presiding

David Ross
John Carro
Sidney H. Asch
Arnold L. Fein, Justices.

17236

In the Matter of the Application of Charles A. Weil,

Petitioner-Appellant,

-against-

Joseph T. McClough and Ermyn Stroud,

Respondents-Respondents,

For a Judgment under CPLR Article 78.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County (Kenneth Shorter, J.), entered on December 28, 1982, which denied petitioner-appellant's application for an order prohibiting Environmental Control Board from proceeding with a hearing, and said appeal having been argued by Charles A. Weil, appellant

Decision

pro se, and by Trudi Mara Schleifer, of counsel for the respondents; and due deliberation having been had thereon.

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

Joseph J. Lucchi
Clerk.

OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, NEW YORK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. KENNETH SHORTER, Justice

Upon the foregoing papers this petitioner's motion for an order prohibiting the Environmental Control Board from proceeding with the pending hearing pursuant to the Administrative Code 1403.3-4.05(1) of the City of New York is DENIED in all respects.

Petitioner is attempting to restrain an officer from acting in a judicial or quasi-judicial capacity. This extraordinary remedy is used only when there is a clear legal right; and only when that body or officer acts or threatens to act in a matter beyond his jurisdiction.

Here the Board has the legal authority to hold a hearing and render a determination on the alleged violation. Petitioner's claim that the hearing should not be held because he was denied discovery is without merit at this time. The hearing could possibly exonerate him, and render all other issues raised, a moot.

KENNETH L. SHORTER, J.S.C.

Dated: December 17, 1982

No. 83-1482
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

In the Matter of the Application of

CHARLES A. WEIL,

Petitioner,

-vs.-

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTION PRESENTED

Where petitioner has failed to raise a facially valid question regarding the constitutionality of the New York City Administrative Code provision in issue, and where a hearing on the merits may exonerate petitioner, did the New York Court of Appeals properly affirm the decision of the New York Supreme Court dismissing the state court petition seeking to prohibit the respondents from conducting the hearing?

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IN THE
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CHARLES A. WEIL,

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

STATEMENT OF FACTS

On or about June 6, 1982, petitioner received a Notice of Violation for "horn honking" in a non-emergency situation, in contravention of the New York City Administrative Code Section 1403.3-4.03(1). Petitioner was seated in his car on East 59th Street in Manhattan at about 5 p.m. and, he claimed, attempted to alert a police officer to the existence of a traffic jam. By letter dated June 8,

1982, petitioner requested that the Environmental Control Board provide him with a bill of particulars and supporting affidavit, pursuant to the New York Criminal Procedure Law.

Thereafter, petitioner received a notice of hearing on the citation for September 20, 1982. By letter dated June 24, 1982, petitioner again requested that the Environmental Control Board supply him with a bill of particulars and supporting affidavit and stated that if his request were not complied with, he would move for dismissal on that basis and on the grounds that the regulation was unconstitutionally vague, indefinite, unreasonable, and in violation of the first and sixth amendments of the United States Constitution. The requests were not met, since the proceeding was not criminal in nature. Petitioner thereafter maintained that the proceeding was civil in nature and requested discovery pursuant to "CPLR Article 30/31"; no discovery was provided.

By letter dated August 4, 1982, addressed to respondent Ilmyn Streud, the Administrative Law

Judge assigned to the case, petitioner, inter alia, reiterated that a bill of particulars and supporting affidavit were material and necessary for due process. Petitioner maintained in that letter as well as in another of August 17, 1982, that the proceeding was criminal in nature.

Petitioner commenced the instant proceeding on or about August 30, 1982, by order to show cause. He sought to prohibit the Environmental Control Board from proceeding with the hearing since he claimed the regulation pursuant to which he had received the notice of violation (NYC Administrative code 1403.3-4.05) was unconstitutionally vague, indefinite, and unreasonable and denied petitioner his right to communicate the existence of a violation of law ("a serious breakdown of traffic control") to a police officer.

By letter dated September 22, 1982, addressed to Steven Alexander, the assistant corporation counsel handling the case, petitioner amended his petition to add paragraph 11, in which he stated that

he did not challenge the right of the Environmental Control Board to hold a hearing on the evidence but rather challenged inter alia, the right of the Board to legislate "vaguely" and "unconstitutionally"; pass on the rule's construction and constitutionality; find the facts and the law; and hear any appeal of the matter, since such a system denied the essentials of due process and separation of powers.

Respondents thereafter (on or about October, 1982) cross-moved for dismissal of the petition for failure to state a cause of action. In the affirmation in support of the cross-motion, counsel stated that prohibition is appropriate only where a clear legal right has been asserted and where it is clear that there is a threat that the court or administrative body is about to act without jurisdiction over the subject matter or will exceed its powers; and even in such circumstances, prohibition may not lie where the alleged defects could be otherwise corrected. Moreover, petitioner's complaint regarding discovery was not properly cognizable in the context of prohibition. Respondents further contended that

the constitutional issue could not properly be raised at this time since no factual determination had been made and that after such determination petitioner might be exonerated, thus mooting the issue. Respondents noted too that the alleged vagueness of the regulation in question did not raise a substantial constituitonal claim since the issue is whether petitioner had used the horn "as a sound signal of imminent danger".

Petitioner submitted a reply affidavit, dated October 8, 1982, in which he maintained, inter alia, that the proceeding was brought "principally because of the constitutional aspect of the matter"; that petitioner did not necessarily seek a writ of prohibition; that there was no material question of fact but rather a question of the constitutionality of the regulation.

ORDER OF THE NEW YORK SUPREME COURT, SPECIAL TERM

By order dated December 17, 1982, the New York Supreme Court, Special Term, denied petitioner's motion in all respects. The court held that:

> Petitioner is attempting to restrain an officer from acting in a judicial or quasi-judicial capacity. This extraordinary remedy is used only when there is a clear legal right; and only when that body or officer acts or threatens to act in a manner beyond his jurisdiction.
>
> Here the Board has the legal authority to hold a hearing and render a determination on the alleged violation. Petitioner's claim that the hearing should not be held because he was denied discovery is without merit at this time. The hearing could possibly exonerate him, and render all other issues raised as moot.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

By order dated June 30, 1983, the New York Supreme Court, Appellate Division, First Department, unanimously affirmed the order of

Special Term.

ORDERS OF THE NEW YORK COURT OF APPEALS

In its order dated November 3, 1983, the New York Court of Appeals dismissed petitioner's appeal on the ground that "no substantial constitutional question is directly involved." In its order of December 20, 1983, the Court denied petitioner's motion to vacate the order of dismissal.

RELEVANT STATUTE

§1403.3-4.05 ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

> §1403.3-4.05 Sound signal devices. No person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise, except that:
>
> (1) No person shall operate or use of cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger provided that such operation or use shall be considered in any proceeding before the board pursuant to any applicable section of article VIII of this code except section 8.25 prima facie evidence of a violation of this subsection and that a notice of violation shall in every instance

issue against a person operating, using or causing to be operated or used a claxon installed on a motor vehicle.

ARGUMENT

THE PETITION WAS PROPERLY DISMISSED, SINCE PETITIONER HAS PRESENTED NO FACIALLY VALID CHALLENGE TO THE CONSTITUTIONALITY OF THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION IN ISSUE AND, IN ANY EVENT, A HEARING ON THE MERITS MAY EXONERATE PETITIONER AND THUS RENDER THE CONSTITUTIONAL ISSUE MOOT.

The gravamen of petitioner's opposition to the Environmental Control Board hearing on the citation is a challenge to the general scheme of administrative law, that is, that an administrative body may find facts and impose sanctions for violations of rules enacted to protect the public welfare. Certainly it cannot seriously be maintained that the Environmental Control Board is without jurisdiction to review allegations of infractions of the regulations designed to curtail unnecessary noise in New York City. Even if it were the case, as

petitioner believes it is, that the alleged violation was issued for a trivial noise or traffic infraction, that fact does not vitiate the legitimacy of the regulation or the administrative scheme for enforcing it. Moreover, under Ex parte Young, 208 U.S. 123 (1908), and Younger v. Harris, 401 U.S. 37 (1971), the federal court will intervene in state court prosecutions only in extraordinary circumstances. It is submitted that, as will be discussed below, those circumstances do not obtain in the instant case. For similar reasons, the State courts properly declined to enjoin the proceedings. No valid reason exists to enjoin the administrative agency from conducting a hearing on the merits of this violation and to render a decision.

Petitioner contends that the regulation is unconstitutional because of its vagueness and overbreadth and because it infringes upon his right to free speech under the first amendment. He contends that the regulation in question is vague and overbroad essentially for two reasons: first, because it prohibits the use of sound devices except for

situations of imminent danger and that the meaning of imminent danger is unconstitutionally vague and indefinite (Pet. Br. at 11-18); second, because specific decibel levels are not set forth so as to establish a standard of acceptable noise (Pet. Br. at 18-23). He also contends that the regulation impermissibly infringes on his right to communicate (Pet Br. at 23-26).

It is submitted that the activity in issue, "horn-honking", is not speech. Considerations of the protections of the First Amendment therefore do not apply. What is involved is simply a valid exercise of the police power of the municipality in regulation of non-communicative conduct. "Horn-honking" is not communicative; even if it is being used to alert, it is merely noise, subject to valid regulation in the public interest.

Assuming arguendo the use of car horns to be generally protected by the First Amendment as a mode of communication, it is submitted that the City may nonetheless regulate the use of such devices. The ordinance in question does not attempt

to regulate the content of such "expression". All use of car horns is prohibited (except, of course, for emergencies) regardless of the purpose or purported meaning intended by the user. The ordinance does not discriminate among various possible messages which one may seek to communicate through use of a car horn. The ordinance is therefore content-neutral and the standard for such regulations is that they must be reasonable as to the time, place, and manner of the restrictions in the furtherance of significant governmental interests. Overly loud sound amplifiers, for example, may be required to be turned down. See Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1971). "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving soundtrack that blares at 2 p.m. disturbs neighborhood tranquility." Consolidated Edison Company v. Public Service Commission, 447 US 530, 536 (1980). In the instant case, the "content" of

petitioner's communication was not infringed. The statute in issue seeks merely to regulate the "time, place, and manner" of the noise in furtherance of the legitimate governmental concern of reducing unnecessary noise in a noisy city. Nor does the ordinance unduly restrict the channels of communications with policemen. A citizen has more than adequate means of communication with patrolmen, aside from the use of a car horn. The ordinance really does not more than restrict the use of a piece of safety equipment (required to be on a motor vehicle by government regulation) to the use for which the horn is intended and designed - to warn of imminent danger. The use of car horns in situations not involving imminent danger undercuts the usefulness of such horns as a method of communicating the existence of an actual emergency condition, and the government has a compelling interest in seeing that this does not occur.

It is submitted that a hearing is provided for the express purpose of determining the facts and

circumstances, to ascertain the noise was unnecessary or whether there was an imminent danger.

It is precisely because the exigencies of various situations will differ that no more specific standard is - or should be - enunciated. Certainly, the language of the statute is not so vague that a reasonable person cannot grasp its impact. Cf. People v. Stefanik, 163 Misc. 2d 529 (Sup. Ct. App. Term, 1st Dept., 1980); People v. Cruz, 48 NY 2d 419, 424 (1979). Petitioner is in a position to describe the situation in issue and present his justification for the use of his car horn and there is no basis to assume that he would be given anything but a fair hearing. Indeed, it is in the context of the hearing itself that petitioner may properly raise any procedural objections he may have (e.g., his objections to lack of pre-hearing discovery; see Pet. Br. at 29).

An exceedingly strong presumption of constitutionality applies to the ordinances of a municipality enacted in the exercise of its police

power. See Lighthouse Shores v. Town of Islip, 41 NY 2d 7, 11 (1976); People v. Judiz, 38 NY 2d 529, 531 (1976). A statute will be upheld as valid if it has a rational basis (Grossman v. Baumgartner, 17 NY 2d 345, 349 [1966]); if any state of facts justifies the law, the court's power of inquiry ends. Lighthouse Shores v. Town of Islip, supra, 41 NY 2d at 11, 12; Defiance Milk Products v. DuMond, 309 NY 537, 541 (1956); DeSena v. Guide, 24 AD 2d 165, 169 (2nd Dept., 1965). It is submitted that the challenged provision of the Administrative Code is rationally based in fact and is a proper exercise of the City's power to protect and preserve the health and welfare of its inhabitants. The provision is based on the need to reduce the high level of noise in the City. There is nothing unreasonable or arbitrary in placing a duty upon a motorist to avoid making unnecessary noise. A hearing before the ECB will determine whether petitioner should be found in violation of the statute. The agency's application of the statute to petitioner's case would then be subject to judicial review by way of a special

proceeding pursuant to state law brought to review the determination. See Younger v. Harris, 401 U.S. 37, 49 (1971).

In view of the above, it is submitted that Section 1403.3-4.05(1) of the Administrative Code is neither unconstitutional on its face nor is it unreasonable, arbitrary or capricious.

For similar reasons petitioner's contention that the regulation violates his First Amendment right to free speech is without merit. The regulation is designed to curtail unnecessary noise; it is not intended to - nor does it - infringe upon any individual's right to "communicate." As noted supra, the regulation itself provides for defense that the noise was necessary. Petitioner has in fact presented such a defense, in his papers in the state courts in the instant proceeding. It is submitted that the proper forum for such defense is the ECB hearing itself. See Younger v. Harris, 401 U.S. 37, 51 (1971).

Indeed, the various objections raised by petitioner are either cognizable in the context of

the hearing or would be rendered moot by a favorable adjudication. The instant appeal does not fall within the exception to the mootness doctrine whereby a court may entertain an appeal where there exists an issue of general importance which is likely to recur and to evade review by the court. As established supra, it is plain that the City of New York has the power to adopt the challenged statute and that it is a reasonable exercise of its police power. This case thus presents no questions "the fundmamental underlying principles of which have not already been declared" and is not "of the class that should be preserved as an exception to the mootness doctrine." Matter of Hearst Corp. v. Clyne, supra, 50 NY 2d 707, 715 (1980).

Furthermore, even assuming that the questions raised in this case may recur, in that plaintiff or others may receive subsequent summonses for making unnecessary noise, there is no danger that such future action will evade judicial review. Should an administrative proceeding terminate in a decision adverse to a party, that party will have full recourse

to the courts to challenge the adverse determination as well as the statute under which it has been penalized. Hence, there is no reason to decide the constitutional issues petitioner attempts to raise herein instant case, which may well become moot as to the parties, even though similar cases may arise in the future. See, DeFunis v. Odegaard, 416 U.S. 312, 329 (1974). There is consequently no need for this court to pass upon the constitutional claims raised at this time.

It follows, therefore, that the court below did not err in refusing to convert the petition to one for declaratory judgment on the constitutional issue. Plainly, the fact that such conversion is permissible does not per se imply that it must be granted. The granting of a declaratory judgment rests in the sound discretion of the court. Snap 'N' Pops v. Dillon, 66 AD 2d 219, 220 (2nd Dept., 1979). A declaratory judgment action may be appropriate where the validity of a statute involving criminal sanctions is in question. See French v. Devine, 547 F. Supp. 443 (D.C. D.C. 1982). Where questions of

fact exist, however, the court, in its discretion, may decline to render a declaratory judgment. French v. Devine, supra.

In the instant case, the petition raises a factual issue as to whether petitioner in fact violated the administrative code. There is a factual issue as to whether petitioner was justified, within the meaning of the Administrative Code, in using his car horn. Indeed, petitioner's appearance before the ECB and request for discovery on the charges set forth in the summons indicate an intention to contest his liability. Under such circumstances, the court, we submit, did not abuse its discretion in determining that the factual issues precluded the granting of a declaratory judgment. The petition was dismissed not because it was not presented in the proper form (that is, that petitioner brought a proceeding for review pursuant to CPLR Article 78, rather than instituting an action for declaratory judgment), but instead because there was no need for the court to address the constitutional issues at that time; factual questions remained - and still

remain - outstanding. It is after a hearing that, assuming petitioner is adjudicated to have violated the regulation, constitutional issues may properly be raised.

As noted above, a hearing at which the facts are adduced might result in an interpretation of the statute favorable to petitioner, thereby obviating the necessity for a determination of the "constitutional" issues. The administrative agency should be given the opportunity to "develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and ... to prepare a record reflective of its expertise and judgment." Watergate II Apartments v. Buffalo Sewer Authority, 46 NY 2d 52, 57 (1978). Cf. French v. Devine, 547 F. Supp. 443, 447 (D.C. D.C. 1982), where the court refused to issue a declaratory judgment as to whether certain proposed activity would subject the plaintiff to prosecution under the Hatch Act before he had obtained administrative rulings on the legitimacy of his proposed activity.

In view of the above, the court properly determined, in the exercise of its discretion, that factual questions existed which should have been resolved, in the first instance, at the administrative level. At this stage of the proceeding, it cannot be said that the court, in dismissing the petition, improperly "evaded" the constitutional issues. See Demarest v. City Bank Co., 321 US 36, 42 (1944).

Since the constitutional issues need not have been addressed, it was not error for the court to refuse to deem the petition as seeking declaratory judgment and to dismiss the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 29, 1984

Respectfully submitted,

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No. 84-1482

In The

Supreme Court of the United States

October Term, 1983

In the Matter of the Application of

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Respondents completely ignore critical issues presented in petition for certiorari: whether the regulation is unconstitutional for:

a. vagueness and indefiniteness;

b. overbreadth;

c. infringement on the first amendment right to communicate violations of law to a police officer;

d. infringement on the equal protection of the laws;

e. impermissible speculation whether other avenues of relief are available when constitutional issues of validity are involved;

f. infringement on the Sixth Amendment;

g. speculating on possible mootness of a constitutional issue undisputedly likely to recur.

2. There was misleading misconduct of respondent relative to the spurious prohibition issue *a fortiori* where constitutional issues are involved.

3. There was impermissible evasion by the state courts of constitutional questions.

4. Authorities cited by respondent are inapposite and distinguishable or actually supportive of petitioner's points.

Respondent's brief in opposition to petition for certiorari is a hodge podge of evasions, misleading misstatements, spurious issues and inapposite authorities: (References are to pages of said brief).

A. Evasions:

1. This Court's ruling in *INS v. Chadha* (Point V) at pp. 5, 12, 16 (twice) 17, 18, 19, 20, involving, as herein,

proceedings relative constitutionality of regulation of an administrative agency, rebutting argument at p. 8 of brief in opposition;

2. This Court's ruling, in Demarest and Point VIII of petition;

3. Equal protection clause (Point II of petition);

4. *People v. Boback* (Point III of petition) relative discovery, requirement in New York State, in matters of simplified information as accusatory instruments (*cf., infra,* Point III).

B. Misleading-Misstatements:

1. Quibble on distinction between matters criminal and penal in nature (pp. 2, 3) (neither fish, flesh nor good red herring);

2. Traffic jams v. violations of law, p. 1;

3. As if herein were a matter of content (p. 1, three times) and free speech rather, than communication, and obligation to report law violations (*Roviaro v. United States,* 353 U.S. 53).

C. Spurious issues [the prohibition writ mare's nest (pp. 8-10, of petition at pp. i, 3, 4 (three times)].

D. It fails to answer how else petitioner could, in any recurrence (it dares not dispute the likelihood of Point IV of petition) communicate with a patrolman, than by prior indisputable arm signal, that was indisputably ignored.

Footnote at p. 16 of petition overlooked inadvertent sounding of horns on a sharp turn of the wheel, many of which have klaxon sounders on the wheel rim.

I.

As to Prohibition

Having demolished beyond reasonable doubt two arms of the opinion

a. the discovery aspect
b. speculation relative mooting

the legality of the prohibition sham issue, was covered only by citations (p. 34 of petition) we will only quote from the two authorities:

> If, however, a court acts without jurisdiction, or acts, or threatens to act in excess of its powers, and it affirmatively appears that this will be done in violation of a person's, even a party's, rights but especially constitutional rights, prohibition will lie to restrain the excess of power. LaRocca v. Lane (37 NY 575) at 581.

> It is, rather, the means to prevent an arrogation of power in violation of a person's rights, particularly constitutional rights (see Matter of Lee v. County Ct. of Erie County, 27 N.Y. 2d 432, 437-438, 318 N.Y. 3d 705, 267 N.E. 2d 452). Thus the presentation of an arguable and substantial claim of such an excess of power generally results in the availability of a proceeding in the nature of prohibition (see LaRocca v. Lane, supra, 37 N.Y. 2d at p. 581, 376 N.Y.S. 3d 93, 338 N.E. 2d 606). It is immaterial to this basic determination whether the claim is determined adversely to the petitioner on the merits. That relief ultimately

might be denied does not preclude the proceeding. Nicholson v. State Com'n. on Judicial Conduct, 50 N.Y. 2d 606 at 609.

II.

As to Mootness

Likelihood of future recurrence of past harm either to plaintiff — and the probability that similar cases arising in the future will evade judicial review at 378. *The Mootness Doctrine in the Supreme Court*, 88 Harvard L.R. 773 at 378.

Where there is (any) reasonable expectation that a wrong will be repeated (383) citing *United States v. T. Grant*, 345 U.S. 629, 633.

The need to ensure that repeated conduct of a defendant does not evade judicial review, *supra*, 386 the court has accepted jurisdiction in order to forestall the possibility that the injury will recur at 388.

III.

Relative Discovery

The CPL 100.20 McKinney commentary states

> The form prescribed by the commissioners permits a minimum amount of factual information, and therefore a defendant arraigned upon a simplified information is entitled as matter of right to the supporting deposition of the complainant police officer — citing Peo. v. Key, 45 N.Y. 2d 111. . . .

As with Stefanik, quoted in petition p. 13, petitioner takes up authorities cited by respondents that are inapposite, distinguishable, and/or support petitioner-appellant's points also Consolidated Edison PSC at p. 25 petition and Demarest at p. 33, *infra, Desena v. Gulde:*

> if safety factors or health measures require zoning they must involve safety and health characteristics which relate to the land under regulation as under Point II of the petition.

So with noise regulation, it must involve noise characteristics which relate to reasonable noise regulation, per Point II, not overbroad bans. Likewise re: *Grossman v. Baumgarten* at 199. In which case there was compelling medical necessity — (per) judgment of eminently qualified physicians. There was also a question of standing. *Idem, Lighthouse Shores, Inc. v. Town of Islip.*

Then as to mootness: *Matter of Hearst v. Clyne,* the case was moot without likelihood of repetition and so with *Snap'n Pops v. Dillon,* declaratory judgment is available where constitutional question is involved.

> In New York Foreign Trade Zone Operators v. State Liq. Auth. (285 N.Y. 272, 276) the court said "The remedy (a declaratory judgment) is available in cases where a constitutional question is involved.

So with *Watergate v. Buffalo Sewer* at 57:

> The exhaustion rule however is not an inflexible one. It is subject to important qualifications. It need not be followed, for example when an agency's action is challenged as either unconstitutional . . .

and with *French v. Devine*

> Exhaustion of administrative remedies is unnecessary where the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question.

Likewise with *Ex parte Young* at 126

> We must assume a decent respect for the States requires us to assume that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has clear remedy for the protection of his rights, for he can come from the highest court of every right granted or secured by that instrument and denied by the state court.

People v. Cruz, clearly a matter *malum in se*, not *malum prohbita;* drunken driving and there was a scientific basis for the standard imposed.

People v. Judiz, idem, toy pistol that looks real enough for holdup purposes.

Defiance Milk Products, no rational basis for overbroad ban.

Matter of Hearst Corp. v. Clyne, the question of law had already become moot and was unlikely to recur.

DeFunis v. Odegard, the question could not possibly recur.

Younger v. Harris, glaringly inapposite: relative power of a federal district court to enjoin proceedings in a state criminal

trial court, under state statute previously held constitutional (at p. 40); contrary I Stat. 335 and 28 U.S.C. §2283; not under 28 U.S.C. §§1271, 2201, 2204.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Courts of New York State.

Respectfully submitted,

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